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Secretary for  
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## California Regional Water Quality Control Board San Francisco Bay Region

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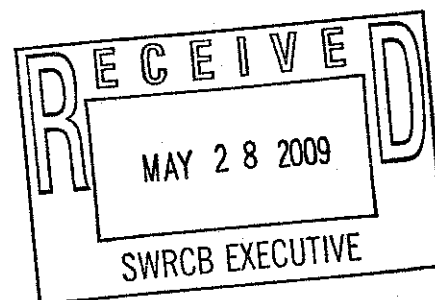
Arnold Schwarzenegger  
Governor

May 28, 2009

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street  
Sacramento, CA 95814

Dear Ms. Townsend:

SUBJECT: Water Quality Enforcement Policy Workshop 6/4/09



Thank you for the opportunity to comment on the draft Enforcement Policy. Our comments focus on Section VI., Monetary Assessments in Administrative Civil Liability (ACL) Actions. We heartily support use of a penalty calculation methodology (Alternative 1) over use of a monetary liability recommendation panel (Alternative 2). A fully tested penalty calculation methodology would help both the Regional Water Boards and the State Board determine consistent and defensible penalties.

However, we cannot support the specific penalty calculation methodology included in the draft Enforcement Policy. We have applied this methodology in developing our monetary assessments in ACLs over the last few months, and we are concerned that the methodology as currently proposed will not achieve the following objectives (as noted on page 11 of the draft document): *"Be assessed in a fair and consistent manner; Should have a reasonable relationship to the gravity of the violation and the harm to beneficial uses and/or regulatory program resulting; Deter the specific person(s) identified in the ACL from committing further violations; and Deter similarly situated person(s) in the regulated public from committing the same type of violation(s)."*

The methodology as proposed has not been fully vetted nor has it been adequately tested to assure that the calculated penalties achieve the desired objectives. What we lack is a portfolio of case examples of penalty consideration factors for the spectrum of discharge and violation types the regions experience. While the regions' enforcement coordinators reviewed the methodology for a number of weeks last fall, and we have applied it for a number of months this year, our concern is that, in a variety of test runs using the methodology as proposed, we generated results for single violations that can vary over an order of magnitude. This is because some of the input parameters are ambiguous, and the weight placed on each input factor has not been fully analyzed. While there are some violations for which the methodology works fairly well, there remain certain types of violations and entire programs where the calculated penalties

would far exceed (by up to two orders of magnitude) penalties that meet the policy objectives.

We recommend that the State Board indicate its preference for a penalty calculation methodology in the Enforcement Policy, but defer including a specific methodology until one has been fully tested by the regions. As such, we recommend that the State Board direct the Regional Water Boards to test the methodology for one year as part of each region's deliberative process before considering incorporating a specific calculation methodology into the Enforcement Policy. As part of this test, we recommend that the State Board put forward a draft methodology without the numeric weighing factors and require the Regional Water Boards to disclose whether something is in the minor, moderate or major range. We welcome the opportunity to continue working closely with State Board staff and the other Regional Water Boards until a methodology is adequately designed to cover the breadth of the enforcement cases the regions consider. Let us spend the time this policy deserves assessing the weight that should be placed on each of the factors.

As noted, we do not support Alternative 2, the proposed monetary liability recommendation panel. We feel this would burden upper State and Regional Water Board management with a chore better done at each region and would unnecessarily slow development and settlement of all enforcement cases.

However, we do suggest convening a panel of key State and Regional Water Board staff to strategically review adopted enforcement actions on a regular basis and make recommendations on use of a penalty calculation methodology and the consistent means of evaluating the various factors used in that methodology. With this type of information, the statewide enforcement program could then hone our enforcement procedures based on these reviews and examples, and, only where needed and appropriate, propose improvements and changes to the Enforcement Policy.

Sincerely,



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by Bruce Wolfe  
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Bruce H. Wolfe  
Executive Officer